were registered in the names of individual members of the family. The learned trial judge on this point took the view that

"there seemed to be an idea in the family that the land must be registered in the land office in the name of whoever was to look after the property."

Such being the case he therefore accepted the evidence of the plaintiff, her husband and her eldest son

"that when this property was transferred to the two defendants after the departure of Yew Hun Eng to Penang, the two defendants were to hold the property in trust for her."

I have anxiously examined the evidence, but with the greatest respect, I think that whatever evidence there is on this point came only from Quah Hong Chiam, who is interested in seeking to recover the palm oil land, and from Quah Ooi Chim who stands, in the event, to gain very considerably. Furthermore, such a conclusion is contradicted, first by the evidence of Quah Ooi Chim himself who said of the three houses registered in his name,

"Legally the property would be mine. On death of my father the houses are mine legally and no death duty would be paid."

Secondly, Lim Phien, the first wife of Quah Hong Chiam, was given the house she resides in, and according to Quah Hong Chiam himself, it was his gift to her: to quote his own words:

"That is the only property my first wife got.... I thought if anything should happen to me it would be bad to leave her without a house."

Thirdly, the Yew Phaik Hoon Rubber Estate was acknowledged to be the plaintiff's own property, though originally it was Quah Hong Chiam's. Yet this estate was not transferred to her for the alleged reason that "land must be in the name of whoever was to look after the property," because she was incapable of managing it.

Before I conclude, I shall touch briefly on two other points. As regards the $10,000 mortgage, it was transferred by the bank as mortgagees to Quah Hong Chiam on 12th May, 1941 and Quah Hong Chiam was finally paid off on 28th February, 1956. This is indisputable proof that the $10,000 was never used in the manner alleged by the plaintiff. Quah Ooi Chim (P.W.3) who claimed to know so much about everything had no explanation to offer.

Finally, on a question of law, I do not think that English authorities, whether on a gift by a mother to a child, or a gift to a stepson, can apply to the affairs of a polygamous Chinese family. Chinese family custom is manifestly different from English ways. For my own part I am also satisfied that, on the facts, a gift of the palm oil estate must have been made to the defendants, unencumbered by a trust in any form. It is true that the father, or the Johore Lumbering Company on his instructions, financed the development of this estate, but he was clearly in a position to protect his investment or advances by collecting repayments, as he in fact did. Any moneylender or finance company lending moneys for similar purposes cannot lay claim to beneficial ownership of the developed property on that account. Hence I cannot see why the father or mother should have any better right. Retention of title deeds by a creditor, by way of security, is in my view, a sufficient explanation for the defendants leaving the titles in the custody of the parent or parents, especially as the parties were on good terms.

I would allow this appeal, set aside the order of the court below, and dismiss the claim with costs.

Appeal allowed.

Solicitors: *L. M. Ong; Leicester & Chen.*

RE DING DO CA, DECD.

[F.C. (Thomson L.P., Ong Hock Thye Ag.C.J. (Malaya) and MacIntyre J.) May 20, 1966]

[Ipoh — Federal Court Civil Appeal No. 61 of 1965]

Chinese marriage — Validity of — Whether Chinese who has married under Christian Marriage Enactment (F.M.S. Cap. 109) could contract a polygamous marriage according to Chinese custom — Distribution Enactment (F.M.S. Cap. 71).

The deceased had in 1923 married one Madam Wong under the Christian Marriage Enactment and subsequently in 1937 he went through the form of marriage according to Chinese custom with Madam Ngoi. After his death Madam Wong applied for and obtained letters of administration to his estate; subsequently Madam Ngoi and her children commenced the action against Madam Wong and sought declarations that she was the widow of the deceased and that her children were his lawful children. Ali J. gave judgment in favour of Madam Ngoi and her children ([1966] 1 M.L.J. 6) and against that decision Madam Wong and her children appealed.

Held: (1) in regard to persons of the Chinese race the courts have given judicial recognition to certain customs which have been imputed to such persons and under such customs Chinese can contract a polygamous marriage;

(2) there is nothing in the Christian Marriage Enactment which renders a party who has married under it incapable during its continuance of contracting a polygamous marriage and therefore in this case the deceased could contract a valid marriage with Madam Ngoi, despite his earlier marriage with Madam Wong under the Christian Marriage Enactment.

Cases referred to:—

(1) *Dorothy Yee Yeng Nam* v. *Lee Fah Mooi* [1956] M.L.J. 257.

(2) *Re Loh Toh Met decd.* [1961] M.L.J. 234.

(3) *Mehta* v. *Mehta* [1945] 2 All E.R. 690.

(4) *Lindo* v. *Belisario* 1 Mag. Con. 216, 220.

(5) *Abdul Messih* v. *Farra* 13 App. Cas. 431, 437.

(6) *Warrender* v. *Warrender* (1835) 2 Cl. & F, 488.

(7) *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, 543.

(8) *Londrus* v. *Chakravarti* [1929] S.L.T. 96.

(9) *De Nicols* v. *Curlier* [1900] A.C. 21.

(10) *Stockley* v. *Parsons* (1890), 45 Ch. D. 51, 55.

(11) *Mong Kuen Wong* v. *May Wong* [1948] N.Z.L.R. 348.

FEDERAL COURT.

P. P. Dharmananda for the appellants.

E. K. Yeap for the respondents.

Cur. Adv. Vult.

Thomson L.P.: This appeal raises once again the question, which has agitated our courts for over a century, of the succession rights of the female relicts and children of a deceased man of Chinese race domiciled in this country.

One Ding Do Ca died intestate in Perak on 7th March, 1949. He was survived by a woman Wong Swee Kiew who is admitted to have been his first wife and who claims to have been his only lawful wife and by two daughters born in wedlock of whom the deceased was the father and Madam Wong the mother. He was also survived by a woman Ngoi Sui Ing with whom he had lived for many years in a connubial relationship and who claims to have been his secondary wife and by a son and a daughter of whom Madam Ngoi is the mother and the deceased the father. All the parties are Chinese, they have been at all times domiciled in the State of Perak and so much of the estate as consisted of immoveable property is situated in Perak.

On 11th November, 1950, Madam Wong filed a petition for letters of administration to the estate of the deceased in which she stated that the next-of-kin of the deceased were herself and her two daughters. Letters of administration were granted to her on 12th April, 1951, and the estate was distributed among the next-of-kin named in the petition some time in 1957.

On 30th May, 1962, Madam Ngoi and her children commenced the present action against Madam Wong and her children. They claimed declarations that Madam Ngoi was a widow of the deceased and that her children were his lawful children and that as such they were entitled to share in the deceased's succession in accordance with the provisions of the Distribution Enactment (F.M.S. Cap. 71 — now replaced by Ordinance No. 1 of 1958) which was the statute in force at the time of the deceased's death. They also claimed various consequential reliefs which it is not necessary to consider here.

In the event Ali J. gave judgment in favour of Madam Ngoi and her children and against that decision Madam Wong and her children have now appealed.

At this stage there is no need to consider the evidence in the case beyond observing that it fully supports the findings of the trial judge that on 28th August, 1923, the deceased went through a form of Christian marriage with Madam Wong and that some time in 1937 he went through a form of marriage according to Chinese custom with Madam Ngoi. The marriage with Madam Wong was celebrated in a Christian Church by a Christian clergyman in accordance with the the provisions of the Christian Marriage Enactment (Cap. 109) of the then Federated Malay States (now replaced by Ordinance No. 33 of 1956) and both forms of marriage were gone through in the State of Perak, the domicile of all the parties at all times.

The trial judge took the view that the law relating to the question before him was not very well settled, that there was authority for the proposition that the personal law of the deceased permitted him a plurality of wives, and that the existence of a prior marriage which was, at least in its inception, monogamous did not incapacitate the deceased from contracting a subsequent polygamous marriage. In any event at some time before the second marriage the deceased had ceased to be a Christian and had embraced Buddhism and this removed any obstacle there might be in the way of coming to the conclusion that Madam Ngoi was a lawful widow.

At the date of the death of the deceased the law relating to the distribution of estates of persons dying intestate was contained in the Distribution Enactment (Cap. 71) which, with effect from 18th August, 1929, replaced the Perak Recognition of Chinese Laws Order-in-Council and made very considerable alterations in the law affecting marriage and succession among the Chinese community. Under the old law a Chinese widow was not entitled to any share in the succession to her deceased husband though she was entitled to maintenance. But by reason of the rules contained in section 7 of the new Enactment she became entitled to a one-third (or if there were no children one-half) share in the estate of her husband if he died intestate and by section 8 it was provided:—

> "If any person so dying intestate be permitted by his personal law a plurality of wives, and shall leave surviving him more wives than one, such wives shall share among them equally the share that the wife of the intestate would have been entitled to had such intestate left one wife only surviving him."

Moreover under the old law daughters had no share in the succession to a deceased father dying intestate but under the new law all children share equally, a "child" being defined as:—

> "a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives."

For myself I have stated my own views on certain aspects of the question of Chinese marriage in this country in the cases of *Dorothy Yee Yeng Nam* v. *Lee Fah Mooi*,[1] a divorce case, and *Re Loh Toh Met, deceased*,[2] which was a succession case. In these two cases I considered every local case of which I was aware and I see no reason to depart from anything I have said, though, no doubt, there are certain infelicities of expression that on reflection might well be corrected.

It is, however, important to observe just what was decided in these two cases.

In *Loh Toh Met's* case it was decided by the Court of Appeal that for the purposes of the Distribution Enactment Chinese polygamous marriages are lawful, that a Chinese domiciled in this country can contract such a marriage irrespective of whether or not he professes the Christian religion and that the children of such marriages are legitimate. In *Dorothy Yee's* case it was held that a Chinese man domiciled in Perak could contract a marriage under the Straits Settlements Christian Marriage Ordinance, 1940 (which was similar to the F.M.S. Enactment) which in its inception was monogamous so as to be capable of being dissolved by divorce under the provisions of the Divorce Ordinance which only applies to monogamous marriages [section 4(1)(a)] and which provides that in giving relief under it the court shall act on the same principles as those on which the Court in England gives relief in matrimonial proceedings (section 3). In that connection it is to be observed that for the purpose of ascertaining whether a marriage is monogamous for the purpose of being dissolved by divorce by a court acting on the principles of English law the material time at which it is to be regarded is the time of its inception [see *Mehta* v. *Mehta* [3]].

In the present case, however, the question is whether a locally-domiciled person of Chinese race who has entered into a marriage which in its inception at any rate is monogamous is thereby disqualified so long as that marriage exists from entering into a polygamous marriage with another woman which will have the effect, in the event of his dying intestate, of giving her a widow's succession rights and the children of the marriage the succession rights of legitimate children under the Distribution Enactment. The question is not a simple one but as was said by Sir William Scott in the case of *Lindo* v. *Belisario* [4]:—

> "it is the business of judges to send into the world, not doubts, but decisions".

"It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends,.....upon domicil alone" (*per* Lord Watson: *Abdul Messih* v. *Farra* [5]). But here we are not concerned with the English law but with the law of this country. And in the case of persons domiciled in this country the local law allows a different personal law to different classes of persons. In particular in regard to persons of Chinese race the courts have given judicial recognition to certain customs which have been imputed to such persons. As I said in the case of *Dorothy Yee, supra*:—

> "In the Straits Settlements, however, whatever may be the position as regards other races, the only conclusion that can be drawn from the *Six Widows Case, supra*, which is the classical case on the subject, is that as regards Chinese the question of personal law is based on race. The courts in effect have given judicial recognition to certain customs prevalent or thought to be prevalent among persons of Chinese race irrespective of their domicile or religion. They have thus set up what might be called a sort of common law as affecting persons of Chinese race and it would seem that the case is the same in those portions of the present Federation which were not formerly part of the Straits Settlements or, perhaps more accurately, which were part of the former Federated Malay States."

As regards marriage these customs were thus described in *Loh Toh Met's* case, *supra* (at p. 236):—

> "the courts have consistently recognized among inhabitants of Chinese origin the custom whereby a man could enter into a permanent conjugal relationship with a principal spouse called a 't'sai' and then during the existence of that relationship enter into equally permanent relationships with other women known as 't'sip'. The courts have held that though the status of the 't'sai' and the 't'sip' may not be in all respects the same yet each has a definite legal status and that the children of their unions have the status of legitimacy. In particular as regards distribution in the case of intestacy the law has been interpreted to give the female partners to such unions equal rights in the widow's share and to treat all the natural children as children of their common father."

It is true that by reason of the Christian Marriage Enactment it is permitted to any person professing the Christian religion, *ex facie* at any rate independently of his personal law, to contract a marriage which is a monogamous marriage in the sense, at any rate, that it can be dissolved under the provisions of the Divorce Ordinance and since 1955 it has been open to any person not professing the religion of Islam but otherwise independently of religion or personal law to contract such a marriage. In that connection, however, it is to be observed that either party to such a marriage has from the commencement of our statutory divorce law been entitled to divorce on the ground of the adultery of the other, which is necessarily implicit in a connubial association with a secondary wife, and since 1st April, 1953, under the Divorce Ordinance, 1952, which replaced the former Divorce Enactment, a wife has also been entitled to divorce on the ground that the husband has, since the solemnisation of the marriage the dissolution of which is sought, "gone through a form of marriage with another woman" [section 7(1)(a)].

It is also well settled that "a marriage celebrated in a form which is monogamous under the law of the place of celebration is a monogamous marriage, whatever the personal law of the parties at the time of the marriage or at any subsequent time".* There is, however, nothing in the Christian Marriage Enactment (or the later Christian Marriage Ordinance) corresponding to the provision of the Civil Marriage Ordinance, 1952, (section 4), which in terms renders a party who has married under it incapable during its continuance of contracting a polygamous marriage. And in *Loh Toh Met's* case it was said that the personal law of Chinese domiciled here resulted from their race and not from membership of any religious community. On the face of it, then, there is nothing in the Christian Marriage Enactment that deprives a Chinese man who marries under it from exercising the right which he enjoys by reason of his personal law to enter into a polygamous union with another woman while his monogamous wife is still alive and, as his personal law stems from race and not from religion, there can be no question of his earlier marriage as a professing Christian being treated as evidence of some sort of notional change of domicile involving some change in his personal law.

And it is difficult to see how if he exercises the right given to him by his personal law to enter into a polygamous union of the type recognised by the courts the partner of that second union and the issue of it can be deprived of the rights *tanta et talia* which the law gives them. As was pointed out by Lord Brougham in the case of *Warrender* v. *Warrender,*[6] a Christian or monogamous marriage and a polygamous marriage in countries in which polygamy is lawful are entirely different things and as Lord Phillimore said in the case of *Khoo Hooi Leong* v. *Khoo Hean Kwee* [7] a Chinese polygamous marriage in the Straits Settlements is "a special kind of union". Once the parties have acquired the status of man and wife the rights of the wife, which include the right to *consortium* and rights to maintenance, and the liabilities of the husband are reciprocal. Generally speaking, however, the enforcement of these rights lies in the Divorce Court. As was said by Lord Mackay in the Scots case of *Londrus* v. *Chakravarti,*[8] where a Hindu had gone through a form of Christian marriage in Scotland with a domiciled Scots woman:—

> "The true way of looking at the matter appears to me to be this: Although by the law affecting one of the parties to a contract of monogamous marriage he may, without offence to his own system of general law, be entitled to take a second wife, yet, if the contracted marriage is his first and if he uses words and so contracts as to leave no doubt that he binds himself towards his spouse to live monogamously, then his taking any second woman to wife, while not rendering him amenable to penal laws in his domicil, is undoubtedly an infringement of the contract of monogamy into which he has entered and of the marital rights of his wife under that contract, and accordingly would afford her a remedy in any competent court where such a breach was recognized as inferring dissolution."

And it must be remembered that a Chinese domiciled in this country, unless possibly he has embraced Islam (a point on which it is not necessary to express any opinion here), has complete freedom to testation. Under our law the wife acquires no vested rights in property held in common, as she may in certain circumstances under the law of France, nor even the so-called *jus relictao,* which is not a vested right, as under the law of Scotland (*vide*: *De Nicols* v. *Curlier* [9]). Her position is the same as it was in England prior to 1938 and as was said by Kay J. in the case of *Stockley* v. *Parsons* [10]:—

> "It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law or next of kin of such living person. During the life of such person no one can have more than a *spes successionis,* an expectation or hope of succeeding to his property."

If then the husband exercises his personal right and marries a second wife by customary marriage she suffers a wrong in the breach of her right to exclusive *consortium* and her remedy for that is divorce. But she suffers no injury to any vested patrimonial right for which the law gives a remedy. After all, it may be wrong from the moral point of view if her husband makes a will leaving his whole estate to charity, or to a mistress or to a secondary wife but against that the law gives her no remedy. And *a fortiori* how can she have any remedy if he marries a secondary wife and then refrains from making any testamentary disposition?

For the foregoing reasons I would dismiss this appeal with costs.

But before departing from the case I would make two observations.

The first is I would, with great respect to the trial judge, reiterate that in my view the fact that the deceased husband had prior to his death ceased to become a Christian and become a Buddhist has no bearing whatsoever on questions relating to his personal law. For myself I know of no jurisdiction where a distinctive system of personal law is permitted to Buddhists as such and in any event it is very clear on the authorities which were discussed at considerable length in *Loh Toh Met's* case that a Chinese in this country derives his personal law from his race irrespective of what his religion may be.

The second is that the whole question of personal law in this country, particularly as regards questions of marriage, divorce and succession, calls for the attention of the legislature.

*Dicey "Conflict of Laws" (7th Ed. p. 270).

As regards persons professing Islam the position is tolerably clear. But as regards persons of Chinese race the law the courts are administering is probably different from any law that exists or ever has existed in China. It even differs from the law which is applied in at least one other jurisdiction within which there are large numbers of locally-domiciled Chinese persons (see *Mong Kuen Wong* v. *May Wong* (11)). The same sort of position may well arise in relation to persons professing the Hindu religion by reason of the enactment in India of the Hindu Marriage Act, 1955.

The questions involved are questions which go to the very root of the law relating to the family which, after all, is the basis of society at least in its present form, and the existence of a civilised society demands that these questions be settled beyond doubt by legislation which will clearly express the modern *mores* of the classes of persons concerned and put the rights of individuals beyond the chances of litigation.

Ong Hock Thye Ag.C.J. (Malaya) concurred.

MacIntyre J.: I have had the advantage of reading the judgment of the Lord President in this appeal with which I concur. I cannot but fully support his call for legislative action to bring our laws in regard to marriage, divorce and succession, in so far as they affect non-Muslims, in conformity with modern thinking on these subjects.

Appeal dismissed.

Solicitors: *Dharmananda & Co.; Yeap & Yeap.*

CHIA BAK ENG & ANOR. v. PONGGOL BUS SERVICE CO.

[F.C. (Tan Ah Tah F.J., Chua and Ambrose JJ.) May 21, 1966]

[Singapore — Federal Court Civil Appeal No. Y. 15 of 1965]

Negligence — Credibility of witness — Judge rejecting evidence of witness — Appellate court coming to conclusion that judge erred in rejecting such evidence — Order for retrial.

In this case the trial judge had dismissed the claim of the plaintiffs in an action arising out of an accident between a cyclist and a bus driven by a servant of the defendants. The trial judge rejected the evidence of a witness, who claimed to be present when the accident happened and gave his reasons for so rejecting the evidence. The plaintiffs appealed.

Held: (1) the reasons given by the learned trial judge for rejecting the evidence of the witness were plainly unsound and the learned trial judge was therefore wrong in rejecting the evidence of the witness;

(2) as in this case the appellate court had not seen the witness it could not decide that the witness was speaking the truth and therefore a retrial should be ordered.

Cases referred to:—

(1) *Montgomerie & Co. Ltd.* v. *Wallace-James* [1904] A.C. 73.

(2) *Thomas* v. *Thomas* [1947] A.C. 487.

FEDERAL COURT.

Denis Murphy for the appellants.

Goh Heng Leong for the respondents.

Cur. Adv. Vult.

Chua J.: This is an appeal from a judgment of the High Court dismissing the claim of the plaintiffs in an action in which the appellants were the plaintiffs and the respondents the defendants. The action arose out of an accident between a cyclist Tan Peng Seak and a bus driven by a servant of the defendants in which Tan Peng Seak was killed.

The main question for determination in this appeal is whether the learned trial judge erred in rejecting the evidence of Lim Ah Huat (P.W.3), the only witness called by the plaintiffs, who claimed to be present when the accident happened.

The evidence of Lim Ah Huat was shortly this. He was riding his motor cycle at a distance of four feet from the left hand edge of the road when he saw a cyclist riding a bicycle about three feet from the edge of the road in the same direction as himself about one hundred feet in front of him. He saw a motor bus overtaking him at a distance of three feet to his right. After overtaking him the bus pulled in to its near side and the bus obstructed his view of the cyclist. He then heard the screeching of brakes when the bus was thirty feet ahead of him and the bus came to a stop. He overtook the bus and he saw in front of the bus the cyclist who had been knocked down and a bicycle lying on its near side four feet in front of the bus and six inches from the edge of the road. He did not see the impact. He found that the cyclist was Tan Peng Seak.

The bus driver did not give evidence as he died before the hearing of the case but he made a report soon after the accident in which he gave his version of the accident. By agreement of the parties this report was admitted.

The defendants called the bus conductor but he did not see how the accident happened. All he could say was that there was an accident and that he saw a person lying in front of the bus and that a bicycle was lying across the road.

The learned judge expressed his views on the evidence of Lim Ah Huat in these terms:

"In this case I regret that I am unable to find any negligence on the part of the driver of the defendant firm since I have decided that no reliance can be placed on the evidence of Lim Ah Huat (P.W.3) who claims to have been an eye witness of what occurred. He did not inspire any confidence in me as he saw nothing of the actual impact although from his version I think that,